NO. 94 821 NOV 3 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JACK GIBBONS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fourteenth Judicial District of Texas, Houston, Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a Texas trial court's exclusion, as irrelevant, an accused's testimony that his conduct in operating a motor vehicle while intoxicated was justified by the legal defense of necessity, violate the Sixth and Fourteenth Amendments?

LIST OF ALL PARTIES

Jack Gibbons, Petitioner

W.B. House Jr., Attorney for Petitioner

State of Texas, Respondent

John B. Holmes Jr., Harris County District Attorney

Dan McCrory, Assistant District Attorney

Jeff Laird, Assistant District Attorney

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1. Petitioner was deprived of his Sixth Amendment right to trial by jury, as made applicable to the states through the due process clause of the Fourteenth Amendment.

2. The court of appeals decision is in conflict with recent precedent from this Court, and with decisions from the Second and Fifth Circuits.

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OPINION BELOW

The Fourteenth Court of Appeals order affirming Petitioner's conviction is reproduced in the appendix at page A-1. The court's published opinion is reproduced in the appendix at page A-2. *Gibbons v. State*, 874 S.W.2d 164 (Tex. App.--Houston [14th Dist.] 1994, no pet.) The Texas Court of Criminal Appeals refusal of Petitioner's petition for discretionary review is reproduced on page A-7. The Texas Court of Criminal Appeals rejection of Petitioner's motion for rehearing is reproduced on page A-8.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was delivered in a published opinion on March 10,1994. Petitioner filed a timely petition for discretionary review with the Texas Court of Criminal Appeals on April 12, 1994. The petition was refused on June 15, 1994, and a timely motion for rehearing was filed on August 1, 1994, and denied on August 5, 1994.

This Court has jurisdiction to review the final judgment of the Court of Criminal Appeals pursuant to 28 U.S.C. §§ 2104 and 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI provides in pertinent part,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the

crime shall have been committed. . .

U.S. Const. amend. XIV provides in pertinent part,

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

Petitioner was convicted of driving while intoxicated after trial by jury in Harris County Court. Petitioner was stopped by Houston Police Officer Caston because he was unable to maintain a single lane. Caston observed symptoms consistent with alcohol intoxication and arrested Petitioner for suspicion of driving while intoxicated.

Petitioner testified that his driving was occasioned by necessity. He testified that his wife had threatened suicide if he did not pick her up from a motel where she was staying with her young lover. Petitioner drove to the motel. Caston stopped Petitioner on the way home from the motel. Petitioner testified he believed the only way his wife would leave the motel was with him. This testimony was preserved in a bill of exception, but kept from the jury by the trial courts' sustaining of the state's relevancy objection. The trial court refused to charge the jury on the defense of necessity. The court of appeals reasoned that any necessity presented by Petitioner's wife's threat of suicide had "evaporated" once Petitioner had reached the motel. (Op. at 4) The Fourteenth Court of Appeals held,

> Appellant's need to drive to a motel to prevent his wife from committing suicide might be a valid justification for driving while intoxicated. We do not rule on that issue as we need not reach it to dispose of this case.

> Once appellant was at the motel he was in a position to keep his wife from committing suicide. Moreover, he was in a position to summon aid in the form of police or paramedics. He need only dial 911. Once appellant re-entered his vehicle, however, and started to drive his wife's young lover home, any possible justification for his conduct evaporated. There was no imminent harm appellant sought to prevent.

(Op. at 4).

The court of appeals summarized the testimony present in Petitioner's bill of exception. The court stated,

> Appellant was permitted to testify that his wife called him and told him she was at a motel with a young lover. He further testified that she wanted Appellant to come and get her. He stated that his wife told him she would kill herself if he did not pick her up from the motel. He also said that the motel was in a dangerous neighborhood, that a woman had been killed a block and a half away about two weeks before the night in question and that he feared for his wife's safety.

(Op. at 3).

The court of appeals did not take cognizance of that portion of the testimony contained in Petitioner's bill of exception, in which Petitioner explained that he believed if he did not personally take his wife home, she would not leave the motel. (See S.F., I, 219-221).

REASONS FOR GRANTING THE PETITION

I. Constitutional Deprivation

In Texas, necessity is classified as a justification, and a justification is a defense, as opposed to an affirmative defense.

Section 9.22 of the Texas Penal Code provides that necessity is a justification. It provides:

> § 9.22 Necessity
>
> Conduct is justified if:
>
> > (1) the actor reasonably believes the conduct is necessary to avoid imminent harm;
> >
> > (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing[1] the conduct; and
> >
> > (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

§ 9.22 Tex. Pen. C. (Vernon 1974)

The requirements of subsections (1) and (2) of § 9.22

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[1] So in enrolled bill; probably should read "proscribing".

must be satisfied with evidence, while subsection (3) presents a question of law. *Leach v. State*, 726 S.W.2d 598, 600 (Tex. App. -- Hous.[14th Dist.] 1987, no pet.); *Williams v. State*, 630 S.W.2d 640 (Tex. Crim. App. 1982). Questions pertaining to the reasonableness of the accused's beliefs are fact questions for the jury to resolve. *Semaire v. State*, 612 S.W.2d 528, 530 (Tex. Crim. App. 1980).

Justification is a defense under Texas law. Section 9.02 of the Texas Penal Code provides:

> § 9.02 Justification as a Defense
>
> > It is a defense to prosecution that the conduct in question is justified under this chapter.

§ 9.02 Tex.Pen.C. (Vernon, 1974).

Prior to the codification of the necessity defense, much confusion existed regarding its application to driving while intoxicated cases. The Practice Commentary to § 9.22 of the Texas Penal Code explained,

> The Court of Criminal Appeals in two cases refused to recognize a general principle of necessity. In *Butterfield v. State*, 317 S.W. 2d 943 (Tex. Crim. App. 1958), defendant after becoming intoxicated received a serious head injury. Not having a telephone in his apartment, the only way he could secure medical aid was by driving. Reviewing his conviction for driving while intoxicated, the Court of Criminal Appeals upheld the trial court's refusal to charge as a defense the theory that defendant drove his car upon a public highway because of necessity for the purpose of seeking medical treatment, the court remarking, "We are aware of no such defense."

> The court followed *Butterfield* in the 1965 case of *Sansom v. State*, 390 S.W.2d 279 (Tex. Crim. App. 1965), but neither *Butterfield* nor *Sansom* cited an earlier case, *Woods v. State*, 121 S.W.2d 604 (Tex. Crim. App. 1938) which recognized, although not by name, a general principle of necessity. In codifying this principle Section 9.22 firmly establishes its existence and spells out the details of its application.[2]

Bush v. State, 624 S.W.2d 377 (Tex. App.--Dallas 1981, no pet.), was the only Texas case since the codification of the common law defense of necessity in 1974, to address the question of whether the necessity defense was available to a defendant charged with driving while intoxicated. *Bush* was the precedential anchor for the court of appeals decision in the instant case. *Bush* is distinguishable from the case at bar, because Bush spent three hours drinking in a bar after escaping her abusive spouse and prior to her arrest for driving while intoxicated. Petitioner testified in his bill of exception that he perceived the necessity to be ongoing, in that he believed his wife was at risk until he brought her safely home. Thus, the reasonableness of Petitioner's belief should have been decided by the jury, after they had heard all of the facts. Also, in *Bush*, the court misclassified the necessity defense as an affirmative defense[3] and found that the defendant had not put on sufficient evidence to receive a jury question on the defense.

Petitioner's position is best understood by way of

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[2] Practice Commentary to TEX. PENAL CODE ANN. § 9.22 (Vernon 1974)(not included in TEX. PENAL CODE AN. § 9.22 (Vernon 1994).

[3] See 624 S.W.2d at 379.

analogy to Texas' self-defense statute. Self-defense is also a justification-based defense. *See Texas Penal Code* § 9.32. Texas' penal code is similar to the Model Penal code, in that they both create justifications based on self-defense, "when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." *Semaire v. State*, 612 S.W.2d at 530. The Texas Court of Criminal Appeals interpreted the Model Penal Code as follows:

> The comment to Section 3.04 in Tentative Draft No. 8 at 18 (1956) was that, "The draft does not require that the force against which the actor defends himself *be*[4] unlawful; it is enough that he believes it to be so."

Id. *citing* W. La Fave & A. Scott, Handbook on Criminal Law 392 (1972).

The court thus reasoned,

> [T]he question is not whether there was any evidence that the deceased's use of force was unlawful; the appellant was entitled to an instruction on the law of self-defense if there was any evidence that he reasonably believed that the deceased's attempted use of force was unlawful. It must be remembered as we stated in *Warren v. State*, 565 S.W.2d 931, 933-934 (Tex. Crim. App. 1978) (citations omitted in original):
>
> > "A defendant is entitled to an

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[4] Emphasis in original.

> affirmative defensive instruction on every issue raised by the evidence regardless of whether it is strong, feeble, unimpeached or contradicted, and even if the trial court is of the opinion that the testimony is not entitled to belief. The defendant's testimony alone may be sufficient to raise a defensive theory requiring a charge."

Thus, Appellant is entitled to a jury charge on necessity, so long as some evidence raises the defense and so long as the legislature has not plainly excluded application of the justification from the charged offense.

This position is supported by examination of the necessity statutes of Alaska and Vermont. In Alaska, where the necessity defense is an affirmative defense, the accused must demonstrate that the necessity existed by a preponderance of the evidence. In affirming the trial court in *Reeve v. State*, 764 P.2d 324 (Alaska App. 1988), the Alaska Court of Appeals explained,

> In contrast, necessity is an "affirmative defense." *See e.g.*, AS 11.81.900 (b)(1) ("affirmative defense" means that (A) some evidence must be admitted which places in issue the defense; and (B) the defendant has the burden of establishing the defense by a preponderance of the evidence.

Reeve v. State, 764 P.2d at 326.

While the court in *Reeve* did not reach the issue of the quantum of evidence that would entitle Appellant to a jury instruction on necessity, it held that Appellant could not have

reasonably perceived that her "continuing violation" was justifiable as a response to necessity, when she had already, in the court's opinion, escaped the risk of physical harm from which she was fleeing, at the time she was arrested. Thus, in the guise of this "continuing violation" analysis, the court implicitly decided that appellant failed to meet her burden of production.

In contrast to Alaska's approach, and, consistently with Texas' approach, Vermont classifies the necessity defense as a "defense". Accordingly, in *State v. Shotton*, 458 A.2d 1105 (Vt. 1983) the Vermont Supreme Court held,

> Where there is evidence offered which supports the elements of the defense, the questions of reasonableness and credibility are for the jury to decide.

State v. Shotton, 458 A.2d at 1106.

The Court explained further,

> [T]he jury should have had the opportunity to weigh the reasonableness and credibility of all the evidence, and to decide if it was sufficient to establish the defense of necessity. It was the function of the jury to determine first whether defendant was driving under the influence of intoxicating liquor, and if she was then to determine whether she was justified in doing so because of necessity. By refusing to charge the jury on the second issue, the trial court committed reversible error.

Id. at 1107.

The Texas trial court committed reversible error in the same

fashion, and the Court should grant certiorari to make that determination.

II. Conflicting Decisions

The right to trial by jury in serious criminal cases is fundamental to the American scheme of justice and therefore applicable in state proceedings. *Sullivan v. Louisiana*, 508 U.S.____, 113 S.Ct.___, 124 L.Ed.2d 182 (1993), *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The right includes, of course, as its most important element, the right to have the jury, rather than the judge reach the requisite finding of "guilty." *Sullivan citing Sparf and Hansen v. United States*, 156 U.S. 51, 105-106, 15 S.Ct. 273, 39 L.Ed. 343 (1895).

The Second and Fifth Circuits have both held that a defendant is entitled to jury determination of all factual issues. *United States v. Rogers*, 9 F.3rd 1025, 1032 (2nd Cir. 1993); *United States v. Johnson*, 718 F.2d 1317 (1983). The prosecution bears the burden of proving all elements of the offense charged, *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 1349, 53 L.Ed.2d 281 (1977), and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).

Section 2.03 of the Texas Penal Code provides that, just as elements of the cause must be proven beyond a reasonable doubt, by the prosecution, so must defenses be disproven. Section 2.03 provides,

> § 2.03 Defense
>
> > (a) A defense to prosecution to an offense in this code is so labeled by the phrase: "It is a

defense to prosecution. . . ."

(b) The prosecuting attorney is not required to negate the existence of a defense in the accusation charging commission of the offense.

(c) The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

(e) A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense.

§ 2.03 Tex. Pen. Code (Vernon, 1974).

By not allowing Petitioner to present the totality of his necessity defense, the trial court usurped the jury's role, and deprived Petitioner of his Sixth Amendment right to have the jury, rather than the judge, weigh the testimony and decide his fate.

III. A Substantial Federal Question Has Been Raised

The record reflects that Petitioner raised a substantial claim before the Fourteenth Court of Appeals. *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). The question is intrinsically important and, "beyond the academic or episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70

(1955). The issue of whether a defendant is entitled, under the Sixth Amendment, to jury determination of the reasonableness of beliefs he asserted as grounds for defense, reaches all litigants in criminal proceedings. The risk of loss of liberty, at the hands of a trial court that renders a defendant moot by answering fact questions for the jury and deciding itself what belief is, or, is not reasonable, strikes at the very heart of our concept of justice and ordered liberty.

Petitioner is aware that certiorari is rarely granted when review is sought solely to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984). The question raised in the instant case is a mixed question of fact and law. The Fourteenth Court of Appeals was remiss in its rendition of the facts, in that it failed to account for the totality of Petitioner's justification testimony, preserved in his bill of exception. Moreover, Petitioner's belief that his conduct was justified by the necessity of his wife's threatened suicide, raised a legal issue that is properly before the Court.

Moreover, the Fourteenth Court of Appeals' decision should be reviewed, as it constitutes a gross miscarriage of justice. *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Washington v. United States*; 357 U.S. 348 (1958).

Conclusion

This petition for writ of certiorari should be granted.

Respectfully submitted,

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MARCH 10, 1994

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

JACK GIBBONS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

NO. C14-92-00939-CR

This cause came on to be heard on the transcript of the record of the court below. The same being considered, it is the opinion of this Court that there was no error in the judgment. It is ordered by the Court that the judgment be in all things **AFFIRMED**, and that appellant pay all costs in his behalf expended, and that this decision be certified below for observance.

IN THE

FOURTEENTH COURT OF APPEALS

NO. C14-92-00939-CR

JACK GIBBONS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 91-41832

O P I N I O N

Jack Gibbons appeals his conviction for the offense of driving while intoxicated ("DWI"). Appellant pled not guilty and was tried by a jury in the County Criminal Court at Law. The jury found him guilty. The court assessed punishment at 180 days confinement in the Harris County Jail, probated for two years, and a $500.00 fine. On appeal, Mr. Gibbons brings four points of error complaining of the court below's refusal to include a jury instruction, and to charge the jury, on the defense of necessity, and in sustaining the State's objection regarding the relevancy of his

testimony concerning the defense of necessity. We affirm.

The facts, viewed in the light most favorable to the prosecution, are as follows. On October 12, 1991, Officer Caston of the Houston Police Department stopped appellant's vehicle, a Ford truck, on Interstate 10 East because the driver (appellant) was unable to maintain a single lane. He testified that appellant's vehicle crossed the lane line approximately twenty times.

The officer activated his emergency lights as appellant exited the freeway. Appellant pulled over to the far right lane and stopped. Caston approached the vehicle and asked appellant for his driver's license and insurance. He testified that he smelled alcohol on appellant's breath, and noticed that appellant's eyes were bloodshot.

Caston asked appellant to get out of the truck. He testified that appellant staggered as he got out of the truck, and had to hold onto the door to keep his balance. The officer stated he was unable to understand appellant's speech. He was unable to administer a field sobriety test because traffic was heavy and the terrain was not level. He did state, however, that in his opinion, appellant was intoxicated. Caston arrested appellant on suspicion of DWI and transported him to the police station so that additional tests could be run He turned appellant's truck over to Preston Moody, a passenger in the truck.

At the station, Caston turned appellant over to Officer Steven Trahan, a certified intoxilyzer operator. Trahan testified that he informed appellant of his rights both in writing and orally. He then observed appellant for twenty

minutes to ensure that appellant neither belched nor regurgitated prior to taking the intoxilyzer test.

Officer Kimberly Preadom testified that she administered field sobriety tests to appellant at the station. The tests were videotaped. Appellant swayed during a head-tilt test, and was unable to estimate the length of time it took for 30 seconds to elapse. Appellant was instructed to touch his nose three times with each finger. Instead, appellant touched his nose five times with his right finger and four times with his left.

Sebastian Fromhold, a H.P.D. chemist who supervises the breath alcohol testing program, testified that the breath intoxilyzer used to test appellant was functioning properly at the time of appellant's test. Appellant had a reading of 0.149. The legal limit is 0.10.

In his first three points of error appellant argues that the court below erred when it refused to charge the jury on the defense of necessity. Appellant contends that the defense was raised by the evidence, and that by failing to charge the jury properly, he was denied his right to a trial by jury as guaranteed under Article 1, § 10 of the Texas Constitution, and the Sixth Amendment of the U.S. Constitution. In his fourth point appellant alleges that the court below erred by sustaining the State's objection to testimony by appellant regarding the defense of necessity.

In order to understand appellant's claims, it is necessary to look at his testimony. The bulk of that testimony is preserved in a bill of exception. Appellant was permitted to testify that his wife called him and told

him that she was at a motel with a young lover. He further testified that she wanted appellant to come and get her. He stated that his wife, told him she would kill herself if he did not pick her up from the motel. He also said that the motel was in a dangerous neighborhood, that a woman had been killed a block and a half away about two weeks before the night in question, and that he feared for his wife's safety.

However, appellant's testimony also reveals that he went to the hotel, found his wife and her young lover, picked them both up, and started to drive the young lover home.

An accused is entitled to an affirmative instruction on the law as to every defensive issue raised by the evidence. *Lugo v. State*, 667 S.W.2d 144, 146 (Tex. Crim. App. 1984). This includes those affirmative issues raised by his testimony alone. *Thomas v. State*, 678 S.W.2d 82, 84 (Tex. Crim. App. 1984).

Necessity is a defense if the actor reasonably believes the conduct is necessary to avoid imminent harm, if the desirability and urgency of avoiding the harm clearly outweighs the harm sought to be prevented by the law prohibiting the conduct, and a legislative purpose to exclude the justification claimed for the conduct does not otherwise appear. TEX. PENAL CODE ANN. § 9.22 (Vernon 1974).

Appellant's need to drive to a motel to prevent his wife from committing suicide might be a valid justification for driving while intoxicated. We do not rule on that issue as we need not reach it to dispose of this case. Once

appellant was at the motel he was in a position to keep his wife from committing suicide. Moreover, he was in a position to summon aid in the form of police officers or paramedics. He need only dial 911. Once appellant re,.entered his vehicle, however, and started to drive his wife's young lover home, any possible justification for his conduct evaporated. There was no imminent harm appellant sought to prevent.

The facts of this case bear resemblance to those found in *Bush v. State, 624* S.W.2d 377 (Tex. App.-- Dallas 1981, no pet.). In that case, the defendant drove to her place of employment to escape her abusive spouse. When she was unable to locate a certain employee, she got back into her car and began driving to that employee's home. It was on this second leg of her journey that she was arrested for DWI. *Id.*

The reviewing court determined that Bush was not entitled to an instruction on the defense of necessity because she did not show any facts by which she could reasonably believe that her conduct was imminently necessary to avoid harm to herself. *Id.* at 379. There was no justification to support Bush's leaving her place of employment in an intoxicated state because she had already removed herself from the imminently harmful situation of being beaten by her husband.

Consequently, based upon the facts before this Court, we hold that the court below acted properly by refusing to provide a jury instruction or to charge the jury on the defense of necessity. We further hold that the trial court's exclusion of portions of appellant's testimony regarding this

matter was proper because it was not relevant. We overrule appellant's four points of error. We affirm the judgment.

/s/ Bill Cannon
Justice

Judgement rendered and Opinion Filed March 4, 1994.

Panel consists of Justices Robertson, Cannon, and Draughn.

Publish - Tex. R. App. P. 90.

OFFICIAL NOTICE JUNE 15, 1994

COURT OF CRIMINAL APPEALS COA# 14-92-00939

On this day the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

OFFICIAL NOTICE August 5, 1994

COURT OF CRIMINAL APPEALS COA# 14-92-00939

The Court has this day rejected the appellant's motion for rehearing for failure to comply with Rule 230 (b) T.R.A.P.

Thomas Lowe, Clerk